

CANADA / JUDGMENT

Barton-Greig v. Greig

2007 BCSC 173

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Supreme Court of British Columbia

DECIDED

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2007 BCSC 173 Barton-Greig v. Greig

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barton-Greig v. Greig,

2007 BCSC 173

Date: 20070206

Docket: E9293

Registry: Duncan

Between:

Jane Elizabeth Barton-Greig

Plaintiff

And:

John James Greig

Defendant

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

H.J. Doehring

Counsel for the Defendant:

V. Desjardins

Date and Place of Hearing:

20070131 and 20070201

Victoria, B.C.

- [1] The parties separated in 2000 and were divorced in August 2002. All claims for corollary relief were adjourned generally at the time of the divorce, including the claims relating to the two children of the marriage, Cassandra, now age 16, and Tiffany, now age 10.
- [2] Cassandra and Tiffany lived with their mother until early 2004 when Cassandra went to live with her father. Tiffany has remained with her mother since.
- [3] The mother, her new partner and Tiffany live in Mill Bay near Victoria. Cassandra and her mother do not have a close relationship at this time.
- [4] Cassandra has been living in Perth, Australia, since early 2006 but, pursuant to an earlier order, discussed below, Cassandra returned to Mill Bay shortly before Christmas 2006. A central issue before me is whether I should permit Cassandra to return to Australia. Her father now resides there as well.
- [5] The parties need no reminding of the unhappy history of this matter but I refer to it because it has a bearing on some of my findings. Since June 2005, there have been nine chambers hearings, many involving applications and cross-applications, as at present, respecting custody and access issues. There was also a lengthy Judicial Case Conference in May 2006 that resulted in a detailed consent order. This was about mid-way through the applications. After hearing one of the earlier applications in March 2006, I assumed case management responsibilities and informed the parties that I would hear all future interim applications unless I directed otherwise. With the agreement of the parties, I also conducted the case conference which proceeded primarily as a settlement conference. In the result, with one exception, the applications since March 2006 have proceeded before me.
- [6] This course of events has given me a unique opportunity to observe the attitude of the parents towards the best interests of the children and to consider the conduct of the parents as it affects those interests. As well, I have been mindful throughout that the mother believes that the father has effectively alienated Cassandra from her mother such that the mother believes they no longer have a parent-child relationship.
- [7] In part, to address my concerns arising out of the matters set out in the preceding paragraph, I directed that Cassandra personally attend the hearing. The parties arranged for separate counsel, Ms. Melbye, to represent Cassandra. In the result, counsel met privately with Cassandra and prepared an affidavit for her to swear setting out her preferences and dislikes.

- [8] Ms. Melbye attended the hearing on Cassandra's behalf. Cassandra attended in court only when her counsel made a submission. Cassandra then answered my questions, albeit not under oath.
- [9] Generally, the Court is well-served by counsel appointed to assist children who are caught in the middle of parental custody and access disputes. This was no exception. Ms. Melbye's submission was very helpful. While there are obvious pitfalls to receiving unsworn information, I am also satisfied that Cassandra did her best to provide reliable information. That information was almost invariably consistent with the tenor of her sworn affidavit.
- [10] Most importantly, the procedure afforded me the opportunity to assess Cassandra's demeanour, apparent emotional well-being and maturity. While Cassandra presents as a somewhat immature 16 year old, her answers were responsive and sometimes she provided spontaneous information. She has an engaging personality.
- [11] While I have significant concerns about the poor relationship between Cassandra and her mother, I am satisfied that Cassandra is a normal, reasonably happy teen. I accept that she has a clear preference to live in Australia with her father at this time rather than with her mother, her mother's partner and her sister in Mill Bay.
- [12] The father applied on January 19, 2007 on short leave for the following orders:
1. The Defendant, ohn (sic) James Greig, shall [have] interim custody and guardianship of the child, Cassandra Louise Greig, born October 16, 1990 ("Cassie") for the purpose of living in Australia for the period February 8, 2007 to December 20, 2007 for the purposes of attending school.
 2. The Plaintiff, Jane Elizabeth Barton-Greig, to provide the current Canadian Passport for Cassie to the Defendant.
 3. That the arrears of child maintenance pursuant to the Order of Mr. Justice Metzger made February 24, 2006 and payable by the Plaintiff to the Defendant be set and an Order made for the payment of such arrears.
 4. That the Orders (sic) of Mr. Justice Macaulay made March 24, 2006 be varied to provide that the Defendant shall have access to the child, Tiffany Jane Greig ("Tiffany") born October 12, 1996, for the period January 20th to February 4th, 2006 and after that date access would revert back to the access as set out in the Order of Mr. Justice Macaulay.

The chambers judge at the time did not proceed with the father's applications and ultimately referred them to be heard by me in late January. On January 23, the mother applied for short leave to seek orders that:

1. The child Cassandra Louise Greig, born October 16, 1990, ("Cassie"), be directed to attend school.
2. That Cassie be directed to be seen by Dr. Waterman.

3. That a section 15, Custody and Access Report be completed.
4. That Jane Barton-Greig have sole custody and sole guardianship of Cassie.
5. Restraining John James Greig from removing Cassie Louise Greig, born October 16, 1990 and Tiffany (sic) Greig, born October 12, 1996, from the jurisdiction of this court.
6. Order setting this matter down for trial.

I directed that the mother's motion be heard at the same time as the defendant's even though the mother apparently hoped to have a s. 15 report ordered and available for the hearing date.

- [13] In the result, all motions were before me although the context had obviously changed somewhat. The context for the parents' evidence was undoubtedly further changed when Cassandra's affidavit was made available shortly before the hearing.
- [14] At the hearing, the father proceeded with all four of his applications. The mother conceded that it is in Cassandra's best interests to return to Australia and continue school there. She sought an order, however, that the father arrange for Cassandra to live with Amanda Perkins. Ms. Perkins is the father's adult daughter from a previous marriage and, accordingly, Cassandra's half sister. I will address that question later. School in Australia resumes February 8, 2007 so the mother's concession effectively disposed of the applications set out in paragraphs 1, 4 and 5 of her notice of motion as abandoned and I need not refer to them again.
- [15] The mother's position respecting paragraphs 2 and 3 of her notice of motion also altered. Dr. Waterman is a psychologist who proffered a written opinion about possible parental alienation with respect to Cassandra. For the purpose of the report, the psychologist assumed that factual information provided only by the mother is correct. Mr. Doebling, for the mother, had taken the unusual step of seeking this very limited opinion to support the contention that a s. 15 Custody and Access Report would be helpful.
- [16] Counsel for the father criticized this approach and suggested that the psychologist was biased. As there was no possibility that the psychologist would have had access to either the father or Cassandra in the circumstances, counsel for the mother should not to be faulted for doing his best in the abbreviated time available to him.
- [17] Nonetheless, all parties agreed at the hearing that if a s. 15 report were to be ordered, Dr. Waterman could not properly be asked to participate, having expressed a preliminary opinion based solely on the mother's account of events, many of which are in dispute. That effectively disposed of item 2 on the mother's notice of motion which is dismissed as abandoned. The only remaining questions on the mother's notice of motion relate to item 5: the preparation of a s. 15 report and 6: setting the matter down for trial.

- [18] On the first of those questions, counsel for the mother contended that a s. 15 report is still necessary but only in relation to Tiffany. Counsel for the father contends that there is no need for such a report. I agree with counsel for the father.
- [19] Section 15 of the Family Relations Act, R.S.B.C. 1996, c. 128, envisages the court directing "an investigation into a family matter" and, at one time, was commonly relied on to obtain a report, usually by a psychologist, after that person visited the respective homes of the parents and interviewed them, the children and other persons as necessary. In my experience, these reports have fallen largely out of use because of the inordinate length of time it takes to obtain them. Even when privately funded, the reports often take several months to produce.
- [20] Significantly, in the present case, the father has not claimed that Tiffany should live with him in Australia or anywhere else. His claims respecting Tiffany are limited to access.
- [21] The most significant complaint by the mother about the father's access to Tiffany is that he has rarely exercised it. The only controls that she has sought over his access in the past is that he surrender his passport during some access visits and that he not attempt to take Tiffany out of the country.
- [22] Most recently, the father applied on December 21, 2006 for an order permitting him to take Cassandra and Tiffany to the United States over part of the Christmas holiday. I refused his application with costs payable to the mother. I also directed that he deposit his passport with his lawyer before exercising access in British Columbia. He has not renewed that application or made any similar one.
- [23] It is apparent that the mother's real concern is based on her belief that the father has poisoned her relationship with Cassandra and that, given sufficient opportunity, he will do the same thing with Tiffany. Even if that concern is valid, I doubt that a s. 15 Report would provide any useful new information.
- [24] Tiffany has always lived with her mother and appears to be happy and well adjusted. There is some evidence that the father has ignored Tiffany for long periods but little, if any, evidence that he has used access visits to turn the child against her mother.
- [25] The evidence discloses one statement by Tiffany after Christmas access to the effect that her father had refused to let her take her gifts home because her mother would break them but Tiffany will know her mother well enough not to pay any attention to any such statement. Nonetheless, the report is consistent with my impression that the father's ongoing anger at the mother affects his decisions respecting the children.
- [26] Mr. Greig intends to return to Australia at the conclusion of this hearing so it is unlikely that an investigator would have any significant contact with him to explore his attitudes. In any event, I consider his attitudes very clear and they do not reflect well on him.

[27] In my view, the trial judge will be well equipped to assess Mr. Greig's attitude to important questions such as the maximum contact principle set out in s. 16(10) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as well as his willingness to comply with court orders respecting custody and access. I conclude that a s. 15 Report is unnecessary to assist with any issues respecting Tiffany.

[28] The father is highly manipulative. In March 2006 I gave oral reasons (not transcribed), after hearing the first of several applications. Parts of what I said then bear repeating to provide context:

In late February, 2006, the father, without attempting beforehand to obtain the agreement of the mother or a court order, sent Cassandra to live with his adult daughter, from an earlier relationship, in Australia and to attend school there. The mother seeks an order that the father return Cassandra to the jurisdiction of the court. She also seeks orders that are designed to prevent the father taking any steps to move Tiffany, who resides with her mother, to Australia.

Both parents are Australian citizens and own property there. Cassandra was born in Australia; Tiffany was born in Canada after the family moved to Canada in 1996.

There is no doubt that the father knew that he should have sought a court order before sending Cassandra to Australia. ...

...

The mother only found out about the proposed move to Australia at the last minute from Cassandra's school and not as a result of any direct communication from the father or Cassandra. When she found out, she instructed her counsel to apply without notice for an order that she have temporary sole custody of Cassandra with the child's residence continuing to be with her father. She also sought an order restraining the father from taking, or from otherwise sending, Cassandra out of the jurisdiction of the court without the express and written consent of the mother or further court order. Metzger J. granted both those orders on the morning of February 24, 2006. The mother spoke to the father briefly on his cell phone after she obtained the order but did not tell him about it and, instead, tried unsuccessfully to find out where he was so that the order could be served.

...

At the time of the call, the father was taking Cassandra to Vancouver to catch her flight to Australia. He did not inform the mother of the plan for Cassandra to move or volunteer any information at all. While I do not conclude that the father knew of the court order before he placed his daughter on the plane, he must have expected that his wife would make such an application as soon as she learned of the trip. I am unable to accept that the father acted in the best interests of Cassandra.

I went on to recognize the possibility that the father actively encouraged the move with a view to later moving back to Australia himself as the mother had suggested. The father responded to that by deposing only that he advised his solicitor to inform the mother's solicitor that he was staying in Canada. We now know from Cassandra that he planned to move to Australia before she left the country.

[29] Based on the evidence then available, I concluded:

The father's unilateral conduct in this matter is a powerful indication that he does not respect the importance of the mother daughter relationship in spite of the current estrangement between those two. Counsel for the father referred to the father's failure to apply to the court before sending his daughter to Australia as ill advised. It was more than that. The father attempted to avoid any judicial consideration of Cassandra's best interests until after she was established in Australia. ...

I directed that the father return Cassandra to this jurisdiction. He did not do so and, not long after, his then counsel applied for an extension of time to comply with the order. The father never disclosed to the mother or to the court what is now known, that he was living in Australia within a month of the order being made.

[30] The father appeared in court on the next application, in May 2006, and advised the court that he had just returned from Australia but without Cassandra. On that appearance, after hearing from counsel, I recommended a Judicial Case Conference with counsel exchanging briefs beforehand. The parties accepted that recommendation and ultimately reached a consent order at the end of the conference.

[31] The consent order was predicated on the father's statements that, if permitted to remain in Australia for the school year, Cassandra would live with his adult daughter, Amanda Perkins and her family,. It was also predicated on the father's statements that he planned to upgrade his own professional qualification so that he could work as a pharmacist in Washington State, U.S.A., and commute between British Columbia and that state. The obvious advantage to that was that Cassandra could be effectively removed from most aspects of the matrimonial battlefield. It should be pointed out that the father's statements were factual and put forward by him or by counsel on his behalf.

[32] The terms of the order, both in regard to Cassandra and Tiffany, reflect the significance of what was stated. The terms are:

1. The parties shall have interim joint custody and interim joint guardianship of the child, Cassandra Louise Greig, born October 16, 1990.
2. The child, Cassandra Louise Greig, born October 16, 1990 shall reside with her step-sister, Amanda Perkins in Perth, Australia up to and including December 23, 2006.

3. The child, Cassandra Louise Greig, born October 16, 1990 shall reside with the Defendant, John James Greig, commencing December 23, 2006 until further Order of this Court provided that the Plaintiff, Jane Elizabeth Barton-Greig, shall have liberty to apply to have such residency changed after December 23, 2006 without the need for a change of circumstance.
4. That the child, Cassandra Louise Greig, born October 16, 1990 shall return to Mill Bay, British Columbia for the Australian school break between July 8 and July 24, 2006. All arrangements and costs for Cassandra to return to British Columbia for this period shall be made by and paid for by the Defendant, John James Greig.
5. The Plaintiff, Jane Elizabeth Barton-Greig shall have access to the child, Cassandra Louise Greig during the period of her return from Australia between July 8 and July 24, 2006 from 9:00 a.m. to 10:00 p.m. each and every day, including meeting the child, Cassandra Louise Greig at the airport in Vancouver provided that the Plaintiff, Jane Elizabeth Barton-Greig and the child, Cassandra Louise Greig, can mutually agree to change the times including overnight access.
6. The child, Cassandra Louise Greig shall reside with the Defendant, John James Greig for the period the child, Cassandra Louise Greig is in British Columbia between July 8 and July 24, 2006 subject to the access in favour of Jane Elizabeth Barton-Greig.
7. The child, Cassandra Louise Greig, shall return to British Columbia at the end of her residency in Australia on or between December 23, 2006.

...

It is now apparent that Cassandra lived primarily with her father in Perth, at an address undisclosed to the mother, until their return to Canada in December as required by the order.

- [33] This history, of course, also explains why the contemplated access schedule for Tiffany, as agreed to in May 2006, did not transpire as expected. That is a direct result of the father's mendaciousness. It is also apparent that the father has chosen to focus on his relationship with Cassandra in Australia, at least partially at the expense of his relationship with Tiffany.
- [34] The making of the application to take both daughters to the United States immediately upon his proposed return to Canada in December 2006 is a further indication, if any is necessary, of the father's indifference to the principle of maximum contact. He presents as the aggrieved party yet manipulates the mother and the court at every opportunity. When I dismissed his application in December, I urged counsel for the father to convey to the father that he should encourage Cassandra to have dinner on Boxing Day with her mother and sister because both girls would be with him on Christmas Day.
- [35] When the mother attended to pick up Tiffany and Cassandra for that purpose, only Tiffany went with her. It is apparent that the message was never conveyed to Cassandra. I consider it most unlikely that then counsel for the father did not pass on the request to Mr. Greig.

- [36] I have been very critical of the father and, in my view, justifiably so. However, absent viva voce evidence, I am in no position to decide the full extent to which the father may have manipulated Cassandra's views about her mother.
- [37] I have little confidence in the father's veracity or his willingness to comply with court orders. I am satisfied that he has manipulated the court process. I feel, as I am sure the mother must, that we were presented with a *fait accompli* when Cassandra moved to Australia.
- [38] Nonetheless, I recognize, as does the mother, that Cassandra is happier in Australia than she would be if she were forced to stay here. It is in Cassandra's best interests that she continue going to school in Australia where she is doing well by comparison to the local school in Mill Bay.
- [39] It is also apparent that Cassandra is very fond of her father and wants to live with him rather than with her mother. Given Cassandra's age, I see no point in ordering a condition designed to ensure that she live with someone else in Australia.
- [40] The order sought in paragraph 1 of the father's notice of motion is unnecessarily restrictive. I am not prepared to grant the father sole interim custody and guardianship. The May 2006 order provided for interim joint custody and guardianship with primary residence in Australia at Amanda Perkins' residence. An interim order will go in similar terms except that primary residence will be with the father in Australia on the condition that he must inform the mother immediately of any change of residence or phone number. He is also to provide at all times an e-mail address for Cassandra to use as her own for the purpose of communications with her mother and sister and to inform the mother immediately of any change in any such address.
- [41] Cassandra has dual citizenship. Her father has the Australian passport and her mother has the Canadian. Having regard to the conduct of the father to date, I decline to order the mother to give up the Canadian passport. Cassandra can travel back and forth on an Australian passport even if it slows her passage through Canada Customs.
- [42] The arrears in child maintenance arose because the mother was sending the payments to the Perkins address and did not have the father's address. There will simply be an order that the mother pay the arrears of \$2,674 within one month.
- [43] As to Tiffany, there has been no change of circumstances that would justify making an access order on any terms different from the existing order of May 2006. In addition, the earlier March 2006 order restrains the father from taking or sending Tiffany out of the jurisdiction of this court without the express written consent of the mother or further order. There is also no need for the restraining order respecting Tiffany sought by the mother in paragraph 5 of her notice of motion.

- [44] I am firmly of the view that this matter should proceed to trial at the earliest possible opportunity. I will give counsel a limited opportunity to consider how best to accomplish that, including by moving the file to Victoria if necessary. Unless counsel confirm a trial date to be heard within six months, they are to set down a Case Management Conference before me within the next two weeks and I will make such directions as may be necessary. Once fixed, the trial date shall be peremptory as against both parties.
- [45] Although the father succeeded on his main application respecting Cassandra and on the application respecting arrears, he was unsuccessful on his other two applications. I am not prepared to reward his success on the application respecting Cassandra, by awarding costs, having regard to his conduct. Equally, the application respecting arrears arose in part because of his refusal to provide the address at which he and Cassandra were living. I order the parties to bear their own costs.

"M.D. Macaulay, J."

The Honourable Mr. Justice M.D. Macaulay

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